

*William Douglas, Esq; late of Kinglassie, and Mr. } Appellants.
Thomas Belsches his Trustee, - - - - - }*

*Mrs. Isabell Douglas, eldest Sister and Disponee of } Respondent.
the deceased Major-General William Douglas of }
Kirknes, - - - - - }*

The Respondent's CASE.

BY Charter of this Date, *William Earl of Morton* made a Grant of the Estate and Barony of *Kirknes* (the Subject of the present Question) to *George Douglas* his Son, and the Heirs Male of his Body; which failing, to return to the said Earl, his Heirs, Successors and Assigns whatsoever—And,

Upon this Charter *George Douglas* was infeft.

The said *George* (then *Sir George*) *Douglas*, for certain great Sums of Money, and other valuable Considerations in this Deed mentioned, purchased from *William Earl of Morton*, Grandson to the former Earl, a new Charter of the Estate and Barony of *Kirknes*, to himself, his Heirs and Assigns whatsoever, heretably and irredeemably, without Redemption, Reversion, or Regress, whereby the Provision of Return to the Earl of *Morton* and his Heirs, in the Charter of 1595, was totally extinguished and put an End to.

And upon this Charter *Sir George* was infeft.

The said *George Douglas* and *Archibald Douglas* his Son having contracted some Debts, which were afterward acquired by the Earl of *Morton*; and *Elizabeth Brown*, Relict of the said *Archibald Douglas*, having with her Second Husband *William Keith* a Life-rent Right and a Mortgage of 6000 Merks upon some of the Earl's Lands:—A Contract Tripartite was of this Date entered into between *William Earl of Morton* and *Robert Lord Dalkeith* his Son of the First Part; *William Douglas* of *Kirknes*, Grandson and Heir, served and retoured to *Sir George Douglas* of *Kirknes*, of the Second Part; and the said *Elizabeth Brown*, Mother to the said *William Douglas*, and *William Keith* her Husband, of the Third Part: Whereby *William Douglas* makes over to the Earl the Lands of *Fossagubie* and others, Part of the Estate of *Kirknes*. And *Elizabeth Brown* his Mother, and *William Keith* her Husband, discharge and renounce, in Favour of the Earl, a Wadset or Mortgage of 6000 Merks, which they had upon his Lands of *Annacroich*, and also a Life-Rent, which the Earl had granted to them Two, and the Survivor, out of the Lands of *Truffhills*. In Recompence of which Renunciations thus granted by them to the Earl, *William Douglas* gives them equivalent Securities out of the Lands of *Kirknes*: And these Conveyances and Renunciations are accepted by the Earl, in full Satisfaction of all the Debts and Incumbrances he had acquired by virtue of Apprisings affecting the Lands of *Kirknes*; and he renounces in Favour of *William Douglas*, the said Lands, and all his Right therein, to the End that the said *William Douglas* might get himself infeft as Heir to his Predecessors, under the Provision of Return hereafter mentioned.

William Douglas on his Part obliges himself to make up Titles to the Lands by Precept of *clare constat* from the Earl the Superior; which is equivalent to a Service as Heir to his Predecessors, and to accept of a Charter from the Earl to him the said *William Douglas*, and the Heirs Male of his own Body; whom failing, to return to the Earl and Lord *Dalkeith*, their Heirs, Successors and Assigns; with a Provision, that in Case the said *William Douglas* should leave only Daughters, and no Heirs Male lawfully begotten of his own Body, (whereby the Failure of immediate Issue Male of *William Douglas*'s own Body seems to have been the only Event in View) the Earl of *Morton*, his Heirs or Successors, should pay them certain Sums therein stipulated, for their Portions, and which are varied according to the Number of Daughters, with Clauses of Survivorship, and for Maintenance until Payment; and should also pay a yearly Annuity to *William Douglas*, Brother to the deceased *Archibald Douglas*, for the Term of his Life.—Then comes the following Clause, calculated purely to preserve the Right of Return reserved to the Earl of *Morton*, his Heirs, Successors and Assigns: “That it shall not be lawful to the said *William Douglas* of *Kirknes*, or his Heirs Male foresaid, to sell, annailzie or dispoise the said Lands and Barony of *Kirknes*, or any Part thereof, to and in Favour of any Person or Persons whatsoever, directly or indirectly, in Hurt, Prejudice, or Defraud of the said noble Earl and Lord, and their foresaids, anent their Succession of the same failing Heirs Male lawfully begotten of the said *William Douglas*'s own Body as said is, in Manner above-written.”—Reserving always to them Power, Liberty and Licence to provide and infeft their Spouses, One or more, in such Part and Portion of the said Lands and Barony, or in such competent Means to be uplifted forth thereof, as they shall think meet and convenient during all the Days of their Lifetime allenarly, and to perfect and subscribe to them all Manner of Security requisite thereupon.”

This Deed, containing Three several Renunciations of heretable Rights by *William Douglas*, his Mother, and her Husband, to the Earl, was necessary to be recorded in the Register of Reversions, Seafines, and Renunciations, in order to make the said Three Renunciations effectual to the Earl against all Creditors, or singular Successors of the Parties by whom they were made, and was accordingly recorded in pursuance of the 16th Act of the Parliament of Scotland of 1617, intituled, *Act anent the Registration of Reversions, Seifines, &c.*

Upon the Procuratory of Resignation in this Contract, the Earl of *Morton* granted a Charter to *William Douglas*, containing the Clause of Return, the Provisions in Favour of the Daughters, and the prohibitory Clause above-recited; and on this Charter *William Douglas* was duly infeft.

The said *William* (afterward *Sir William*) *Douglas* dying in 1650, left a Son also named *William*, who in his Infancy intermarried with *Elizabeth Kirkaldy*, and by his Contract of Marriage with her, provided the Lands and Barony of *Kirknes* to his Heirs Male of the Marriage; whom failing, to his Heirs Male of any other Marriage; whom all failing, to his Heirs Male and of Tailzie contained in the Infeftments of the said Lands granted to his Father.—No Infeftment passed upon this Contract; but the said *William Douglas* making up his Title to the Barony of *Kirknes* by a special Retour, as Heir to his Father, and after charging the then Earl of *Morton*, upon Precepts from the Chancery, to enter Heir to the deceased Earl, that the said Earl might be in a Capacity to enter him as his Vassal; upon the Earl's Failure *William Douglas* obtained a Charter from the Masters of *St. Leonard's College* of *St. Andrew's*, the Earl's Superiors in these Lands, in favour of himself, and his Heirs Male and Assigns whatsoever; and he was thereupon duly infeft.

Soon after this *Sir William Bruce*, by several Appraisings of the Earl of *Morton's* Estate, which were assigned to him, and also by Two several Conveyances in 1674. and 1677. made to him by the Earl of *Morton*, acquired Right to a considerable Part of the Lands and Estate of that Family; and, amongst others, to the Superiority of and all the Earl of *Morton's* Right, Title, and Interest, in the Lands and Barony of *Kirknes*; and having obtained a Charter of those Lands so acquired by him, upon which he was infeft, he thereby became Superior of the Lands and Barony of *Kirknes*, the Family of *Morton* ceasing thenceforward to have any Right or Interest therein; and the Earl did accordingly deliver up to *Sir William* his Principal Double or Duplicate of the said Contract of 1638. which has been recovered from *Sir John Bruce* his Heir, in virtue of a Diligence or Process of Court awarded for that Purpose.

William Douglas last mentioned of *Kirknes*, died, leaving Issue Two Sons, *Robert Douglas* the eldest, Father to the Respondent, and *William Douglas*, Grandfather to the Appellant.

Of

- 1686 Nov. 4. Of this Date *Robert Douglas* the eldest Son obtained a Precept of *clare constat* from Sir *William Bruce*, then Superior of the Lands of *Kirknes*, for infesting him in the Lands and Barony of *Kirknes*, as Heir to *William Douglas* his Father, and Sir *William Douglas* his Grandfather.
- 1687 Mar. 18. The said *Robert Douglas* afterward granted a Procuratory for resigning these Lands in Favour, and for new Infestment to be granted to him, and *his Heirs and Assigns whatsoever*; and Sir *William Bruce* the Superior did, in Consideration of a Sum of Money paid to him, grant a Charter, with a Clause of *novo damus* to *Robert Douglas*, *his Heirs and Assigns whatsoever*; upon which Charter *Robert* was duly infest, and thereby obtained an absolute Estate in the Lands and Barony of *Kirknes*, descendible to his Heirs and Assigns whatsoever, and discharged of the Provision of Return or Reversion in favour of the Superior.
- 1687 Nov. 10. By Contract of Marriage entered into between the said *Robert Douglas* and Mrs. *Jane Balfour* his Spouse, about Eight Months after the above Charter, he obliged himself to resign the Lands and Barony of *Kirknes* to the longest Liver of them Two, in conjunct Fee and Life-Rent, and to the Heirs Male to be procreated betwixt them; whom failing, to his Heirs Male and *Assigns whatsoever*.—But no Infestment followed upon this Contract, nor upon a Bond of Tailzie afterward executed by him, altering this Destination of Succession, and obliging himself to resign his Lands for new Infestment to himself, in Life-Rent, and to *William Douglas* his Son in Fee, and the Heirs Male to be procreate of his Body; whom failing, to *Isabell Douglas* his eldest Daughter the Respondent, and the Heirs Male of her Body, with divers Remainders over.—His Title therefore, notwithstanding these Two Deeds, continued all along under the Procuratory of Resignation of the 18th of *March* 1687, and the Charter and Infestment of the 19th of *April* 1689.
- 1721 Nov. 21. The said *Robert* (now created Sir *Robert*) *Douglas*, being involved in very considerable Debts, which had been derived to him from his Ancestors, did, of this Date, dispoise the Lands and Barony of *Kirknes* to *William Douglas*, afterwards Major-General *Douglas*, his Son, and the Heirs of his Body; whom failing, to *Isabell Douglas* the Respondent, and the Heirs of her Body; whom failing, to his other Sisters successively, and the Heirs of their Bodies; whom failing, to his nearest Heirs and Assigns whatsoever; upon which Disposition General *Douglas* was infest.
- 1722 Oct. 29. By this Disposition, General *Douglas* was burthened with the Payment of his Father's Debts, according to the Terms of a subscribed Inventory thereof referred to in the Disposition.—And from a stated Account of the Hand-writing of the said General *William Douglas*, soon after his Father's Death, it appears, that after Payment of his Mother's Life-Rent or Dower (which subsisted till the Year 1746) the Interest of the Debts affecting the Estate, and the publick Taxes and Charges, there remained only a mere Trifle of surplus Rents to the General, no more than the Sum of 54*l.* 19*s.* 2*d.* Scots, or 4*l.* 11*s.* 7½ *Sterling*; and upon the expiring of that Life-Rent, the General, by his Acceptance of the Disposition, was bound for the Payment of Portions to his Sisters, extending to 21,000 Merks over and above all the other Debts.
- 1725 Sept. 30. After Sir *Robert Douglas*'s Death, General *Douglas* obtained from Sir *Thomas Bruce* the Superior a Precept of *clare constat*, as nearest and lawful Heir to his Father, in the Lands and Barony of *Kirknes*; upon which he was duly infest.
- Eodem Die. General *Douglas* having paid the Debts affecting this Estate (whereby he in a Manner purchased the same) of this Date made a Disposition of the Lands and Barony of *Kirknes*, disposing the same, failing Heirs of his own Body, to *Isabell Douglas* his Sister the Respondent, and the Heirs of her Body, with Remainders over.
- 1741 Sept. 30. Upon General *Douglas*'s Death, the Respondent obtained a Charter of Resignation from Sir *John Bruce* the Superior, upon the Procuratory contained in the General's Disposition, and was thereupon infest of this Date, and is now in Possession of this Estate.
- 1748 Sept. 14. *William Douglas* the Appellant, who is Heir Male of *George Douglas*, the First of *Kirknes*, and of *William*, the First of *Kirknes*, granted a Trust Bond to Mr. *Thomas Belsches*, who thereupon brought a Process of Adjudication of the Barony of *Kirknes*, in which Process the Respondent appeared, and opposed the Adjudication upon her Titles to the Barony above stated, but consented that her Right should be tried in the same Manner as if the Appellant had completed his Title by Adjudication, and brought a proper Process of Reduction.
- 1751 June 21. The Cause came in Course before the Lord *Woodhall* Ordinary, and his Lordship, by Interlocutor of this Date, "Found, in respect of the said Consent, the Pursuer entitled to go on and compete, and insist here, as if he had an Adjudication, and a proper Process upon it; and ordained Parties Procurators to produce what Writes they were severally to found upon, and to see, and interchange, and state the whole Cause in Writing, by way of Minutes." After this the Parties having been fully heard by their Council before the Lord Ordinary, his Lordship took the Debate to report to the whole Lords, and ordained both Parties to give in Informations.
- It was argued for the Plaintiff, now Appellant, that by the Charter of 1595, the Estate of *Kirknes* was given by the Family of *Morton*, as an Apanage to a younger Son, and the Heirs Male of his Body; and upon Failure of such Heirs Male, to return to the Donor, and his Right Heirs.
- That the Contract of 1638, restored this Estate to its original Constitution, *William Douglas* having thereby agreed to hold it as an Apanage to him, and the Heirs Male of his Body; whom failing, to return to the Earl of *Morton* and his Heirs: That this being the Import of the Charter 1595, and Contract 1638, the Estate remained with the Family as an Apanage for the Second Son, and the Heirs Male of his Body; and as it could be diverted to no other Use, but must go to the Heirs Male of the Body of the Second Son, while any such exist, so upon their Failure, it must return again to the Family; and that it was not in the Power of any of the Heirs Male of the Body of *George* or *William Douglas*, gratuitously to alter the Provisions, in Prejudice of the Heirs Male of the Family of *Kirknes*, and of the Clause of Return provided to the Family of *Morton*: That consequently the Appellant was intitled to set aside the Settlement of this Estate, made by Sir *Robert Douglas* in 1721, upon his Daughter or Heirs Female; and the Settlement made by General *Douglas* in 1741, upon the Respondent and his other Sisters, as being contrary to the Form of the original Grant to his Predecessor, and in Defraud of the Appellant's Right, as Heir Male of the Body of *George Douglas*, to whom, and the Heirs Male of his Body, the Estate was originally granted by the Family of *Morton*, and in Defraud of the Renewal of the said original Grant by *William* Earl of *Morton*, and Lord *Dalkeith* in 1639, pursuant to the Contract in 1638.
- It was answered for the Respondent,
- That no Argument could be founded upon the original Grant of the Estate of *Kirknes* in 1595, to *George Douglas*, and the Heirs Male of his Body, with a Return, upon their Failure, to the Earl of *Morton* and his Heirs; because that Grant was intirely extinguished by the Charter of 1607; whereby Sir *George Douglas* did, for several large Sums of Money, and other valuable Considerations, purchase from the Earl of *Morton* a Fee-Simple, in the Estate of *Kirknes*, that Charter being taken to Sir *George Douglas*, his Heirs, and Assigns, whatsoever, without any Limitation, or Clause of Return to the Family of *Morton*: That therefore the Contract of 1638, and Charter following upon it in the Year 1639, were quite distinct, and could derive no sort of Aid from the original Grant of 1595.
- And with Respect to the Contract of 1638, it was argued;
1. That *William Douglas* was at that time intitled to take up the Succession of the Estate of *Kirknes*, as a Fee-Simple, in Terms of the Charter granted to his Predecessor in 1607; and did accordingly take it as such, by infesting himself upon the Precept of *clare constat*, granted to him by the Superior, as Heir to his Predecessor: That when he agreed, by the Contract of 1638, to limit his Fee-Simple by a Provision of Return, in favour of the Earl his Superior, failing Heirs Male of his own Body, such Limitation ought to bear a strict Interpretation: And it did not appear, from the Tenor of the Contract, that the Parties at all designed extending the same beyond the Event of Failure of the immediate Male

Male Issue of *William Douglas* the Contractor's own Body: That in this confined View only they took care to secure his Daughters in Portions; but no such Provision was made for the Female Issue of any after Heirs; which it can hardly be thought would have been omitted, had this Limitation been meant to extend to all future Generations.

2. That if the Limitation could be extended so far, yet it is apparent, there was no *Jus quæsitum*, or Right intended to be established in favour of the Heirs Male of *William Douglas's* Body, but only in favour of the Earl and his Heirs; and that the Clause of Return and Prohibition thereto annexed, respected only the Earl and his Heirs, but did not at all respect or secure the Appellant, or any of the Heirs Male of *William Douglas's* Body.

3. That the Clause of Return was conceived in favour of the Earl of *Morton* and his Heirs, only as Superiors of the Estate of *Kirknes*:—That, at Common Law, an Estate devised to a Man, and the Heirs Male of his Body, returned to the Superior (being the Donor) upon Failure of such Heirs Male—That this Clause of Return did only express, *ex Abundanti*, what would have been the Right of such Superior at Common Law, upon the Failure of Heirs Male of *William Douglas's* Body—That this Return, being inherent in the Superiority, passed therewith to Sir *William Bruce*, upon his acquiring the Right of Superiority of the Lands of *Kirknes* from the Family of *Morton*—That therefore, as Sir *William Bruce* had passed from, and discharged that Clause of Return, by granting the foresaid Charter of 1687, in favour of Sir *Robert Douglas*, and his Heirs and Assigns whatsoever, the said Clause of Return was at an End.

And lastly—That as this Charter of 1687, with the Infestment following upon it, had been the Title of Possession of the Estate of *Kirknes* for much more than Forty Years, without any Objection made, either by the Heirs Male, the Earls of *Morton*, or Sir *William Bruce* or his Heirs, who came into the Right of the Family of *Morton*, it could never more be called in question, and was for ever secured by the Statute made in *Scotland*, in the Year 1617. for quieting the Minds of the Subjects in the Possession of their Estates; whereby it is Enacted,—“ That whosoever his Majesty's Lieges, their Predecessors, and Authors, have brooked (possessed) heretofore, or shall happen to brook in Time coming, by themselves, their Tenants, and others, having their Rights, their Lands, Baronies, annual Rents, and other Heritages, by virtue of their heretable Infestments made to them by his Majesty, or others their Superiors or Authors, for the Space of Forty Years continually, and together following and ensuing the Date of their said Infestments, and that peaceably, without any lawful Interruption made to them therein, during the said Space of Forty Years: That such Persons, their Heirs, and Successors, shall never be troubled nor sued, nor unquieted in the heretable Right and Property of their said Lands and Heritages foresaid, by his Majesty, or others their Superiors, and Authors, their Heirs, and Successors, nor by any other Person pretending Right to the same, by virtue of prior Infestments publick or private, nor upon no other Ground, Reason, or Argument competent of Law, except for Falshood; and that all Actions competent of the Law upon heretable Bonds, Reversions, Contracts, or others, whatsoever, either already made, or to be made, after the Date hereof, shall be pursued within the Space of Forty Years after the Date of the same.”

Upon advising this Debate, the Lords *unanimously* pronounced the following Interlocutor—“ On Report of the Lord *Woodball*, the Lords repel the Reasons of Reduction, assoilzie (absolve) from the Process of Adjudication, and decern.”

From this Interlocutor the Appellants have presented their Petition of Appeal to your Lordships—But the Respondent humbly hopes the same shall be Affirmed; for the following, amongst other,

R E A S O N S.

- I. As the Return, provided to the Earl of *Morton* by the Grant of 1595. was renounced and given up by the Charter of 1607. whereby the Earl disposed the Lands to Sir *George Douglas*, his Heirs, and Assigns, whatsoever, without Reversion, Redemption, or Regress: So the Limitation stipulated by the Contract of 1638. and the Charter granted thereupon, though it were to be extended to future Generations (which does not appear agreeable to the View of the Parties expressed in the Contract), can never operate, by way of Restraint, in favour of the Heirs Male of *William Douglas's* Body, but only in favour of the Earl of *Morton*, who stipulated the Return, and guarded it with a prohibitory Clause, to secure the Succession in that Event to himself and his Heirs.
- II. This Right of Return, reserved to the Superior upon Failure of Heirs Male of the Vassal's Body, was a Part of the Superiority, and passed therewith, by the Earl of *Morton's* Conveyance in 1674 and 1677. to Sir *William Bruce*; or even taking it as a Limitation to the Earl of *Morton*, his Heirs, and Assigns, distinct from his Right of Superior, it was still a *Right, Title, and Interest, in the Land*, apprised by his Creditors, and well conveyed to Sir *William Bruce*, as standing in the Place of those Creditors; and this Limitation afterward fully released by Sir *William Bruce* the then Superior's Charter of *novo damus*; granting, for a valuable Consideration, in 1687. these Lands to Sir *Robert Douglas*, his Heirs, and Assigns, without Return or Reversion whatsoever.—Were the Law otherwise, the Return reserved in the Charter of 1595. (which is not pretended) must be still in force, being as strong as that reserved in 1638. and no more done in 1607. to bar it, than was done in 1674. and 1677. to bar the other.—And even could this Difficulty be got over, the Appellant would have another insuperable one to encounter; *viz.* That let the Question be which way it will, it is open only to the Earl of *Morton* or Sir *William Bruce's* Descendants to litigate, but not at all to the Appellant, who is no way concerned therein.
- III. All Claim and Pretence of Return, whether released or not released, is now for ever excluded by the Possession of the Respondent and her Ancestors, under Titles discharged of every such Limitation ever since the Year 1687. far beyond the Course of Prescription; and, consequently, her Title unquestionable by the Act of 1617.

There could be no Place for Prescription so long as the Estate was possessed by the Heirs Male of *William Douglas's* Body, who were preferable in the Succession to the Appellant: He had no Title to challenge their Possession.—The Ground of Action upon the Contract 1638. accrued to him only by the Failure of Heirs Male, upon General *Douglas's* Death in 1747.

If the Provision in the Contract of 1638. and Charter of 1639. is supposed to import any Limitation in favour of the Appellant, or other Heirs Male of *William Douglas's* Body, it must of course have been competent to them to bring their Action or Suit as soon as such Provision or Limitation was struck out of the Investitures, and the Investitures taken to Heirs and Assigns whatsoever.—From that time the Prescription began to run, and that there were such Heirs Male living, *and of Age*, at the time of the Investitures being so taken, is allowed by the Appellant; and, if the Possession was by them suffered to continue upon such Titles during the Course of Prescription, this must bar all Right of Action afterward; else no Security could be acquired by Possession during any Length of Time; but Proprietors of Lands would be perpetually disturbed, upon Pretence of Clauses in old neglected Deeds; which must intirely frustrate and disappoint the Effect of that salutary Law, upon which the Quiet and Safety of the Subject's Property does so much depend.

For these and other Reasons the Respondent humbly hopes, That the Interlocutor complained of shall be Affirmed, and the Appeal dismissed with Costs.

AL. FORRESTER.
C. YORKE.

William Douglas, Esq; and }
Mr. Thomas Belches, } Appellants.
his Trustee, - - - }

Mrs. Isabell Douglas, - - - Respondent.

The Respondent's CASE.

*to be Heard at the Bar of the HOUSE OF LORDS,
on day the 24th Day of January 1754.*